(4)

Supreme Court, U.S.
FILED
JUN 24 2003
OFFICE OF THE CLERK

No. 02-1680

In The Supreme Court of the United States

CIGNA CORPORATION, *et al.*,

Petitioners,

v.

PAUL LEODORI,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

REPLY BRIEF FOR PETITIONERS

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, NW
Suite 500 West
Washington, DC 20004
(202) 383-5300

ROBERT C. DRAKE
CIGNA CORPORATION
Two Liberty Place
1601 Chestnut Street
Philadelphia, PA 19192
(215) 761-1000

JAMES B. HERMAN
ACE USA
Two Liberty Place
1601 Chestnut Street TL35M
Philadelphia, PA 19103
(215) 640-1000

EDWARD T. ELLIS
Counsel of Record
JANICE G. DUBLER
MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP
Liberty View
457 Haddonfield Road
Suite 600
Cherry Hill, NJ 08002
(856) 488-7700

MICHAEL K. FUREY
BRETT M. REINA
RIKER, DANZIG, SCHERER, HYLAND & PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962
(973) 538-0800

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

11PP

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISIONS OF LOWER COURTS INVALIDATING ARBITRATION AGREEMENTS ON GROUNDS THAT VIOLATE THE FAA AND THIS COURT'S DECISIONS 2

II. THE UNMISTAKABLE ASSENT RULE IS NOT LIMITED TO THE FACTS OF THIS CASE BUT A RULE OF GENERAL APPLIATION FOR EMPLOYMENT ARBITRATION AGREEMENTS 4

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 3

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 1

Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) 3

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 5, 7

Martindale v. Sandvik, Inc., 800 A.2d 872 (N.J. 2002) 4

Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42 (2d Cir. 1993) 3, 4

Saturn Distribution Corp. v. Williams, 905 F.2d 719 (4th Cir. 1990) 3

Singer v. Commodities Corp. (U.S.A.), 678 A.2d 1165 (N.J. Super. Ct. App. Div. 1996) 4

Young v. Prudential Ins. Co. of America, Inc., 688 A.2d 1069 (N.J. Super. Ct. App. Div.), *cert. denied*, 694 A.2d 193 (N.J. 1997) 4

REPLY BRIEF FOR PETITIONERS

The New Jersey Supreme Court held in this case that an agreement to arbitrate claims arising out of an employment dispute "cannot be enforced against an employee who does not *sign* or otherwise *explicitly indicate* his or her agreement to it." Pet. App. 17a (emphasis added). Respondent does not seriously contend this special condition on the enforcement of employment arbitration agreements – requiring signature or other form of "explicit" or "unmistakabl[e]" assent, *id.* at 16a – applies generally to the enforcement of contracts under New Jersey law. Accordingly, respondent cannot persuasively deny that the decision below conflicts with the repeated precedents of this Court and others holding that state statutes and judicial decisions may not impose conditions on the enforcement of arbitration agreements that are not also imposed on ordinary, non-arbitration contracts under state law. *See* Pet. 13-24.

Nor does respondent even attempt to dispute the importance of the issue presented here to the many employers who do business in states like New Jersey and California, where courts have imposed special conditions on the enforcement of employment arbitration agreements. As the petition explains (Pet. 26-27), and as the *amicus curiae* brief of the Equal Employment Advisory Council reinforces (EEAC Br. 14-15), decisions like the one below create significant uncertainty and disuniformity in the application and enforceability of the arbitration policies of many multi-state employers, "in the process undermining the FAA's proarbitration purposes and breeding litigation from a statute that seeks to avoid it." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (internal quotation marks omitted).

In short, this case easily satisfies every accepted criteria for *certiorari*: the decision below clearly conflicts with numerous decisions of this Court, and deepens a conflict among several federal circuits and state courts of last resort, on an increasingly recurring issue of tremendous importance to the Nation's employers and employees alike. On that basis there is every reason for the Court to grant *certiorari*.

Respondent's brief in opposition does nothing to suggest otherwise. Respondent's brief offers essentially three reasons *certiorari* should be denied. Each is meritless.

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISIONS OF LOWER COURTS INVALIDATING ARBITRATION AGREEMENTS ON GROUNDS THAT VIOLATE THE FAA AND THIS COURT'S DECISIONS

Respondent's main contention is that the New Jersey Supreme Court actually held in this case that no agreement to arbitrate exists at all. BIO at 1. From this, respondent attempts to draw the conclusions that this Court lacks jurisdiction, *id.*, and that the decision below does not conflict with other decisions, each of which, respondent says, involved actual arbitration agreements, *id.* at 6.

But of course respondent's contention that "the New Jersey Supreme Court found no agreement to arbitrate," *id.* at 1, is merely a restatement of the New Jersey Supreme Court's conclusion that the arbitration agreement is *not legally enforceable*, because of the unique condition that court imposed on employment arbitration agreements. The FAA obviously "encompasses laws affecting the

formation of arbitration agreements," *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 724 (4th Cir. 1990), including, for example, a law purporting to hold that agreements are not legally formed absent a clear notice provision, *see Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682, 688 (1996). This Court thus has jurisdiction to review the New Jersey Supreme Court's compliance with the FAA's mandate that state courts recognize and enforce arbitration agreements on the "same footing" as other contracts. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995).

Contrary to respondent's submission, BIO at 6, this case is indistinguishable from key precedents of this Court and others applying that mandate. *Doctor's Assocs.*, for example, did not involve a "technical, procedural and non-substantive defect" in the arbitration agreement, BIO at 6, but a law that (impermissibly) tried to impose a special notice condition on the formation of an enforceable arbitration agreement. Likewise, this case involves a law that (impermissibly) tries to impose a special signature/explicit assent condition on the formation of an enforceable employment arbitration agreement. This case is also indistinguishable from *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993), in which the Second Circuit held that a state-law requirement of "an express, unequivocal agreement" to arbitrate – precisely the same requirement imposed by the New Jersey Supreme Court in this case – was preempted by the FAA because no such enforceability requirement was imposed generally on other contracts under state law. The result in *Progressive Casualty* is utterly irreconcilable with the result below. Respondent neither discusses nor

even cites *Progressive Casualty*, but ignoring the conflict does not make it go away.[1]

II. THE UNMISTAKABLE ASSENT RULE IS NOT LIMITED TO THE FACTS OF THIS CASE BUT A RULE OF GENERAL APPLICATION FOR EMPLOYMENT ARBITRATION AGREEMENTS

Unable to refute the existence of a live and intolerable conflict in authority on the issue presented, respondent tries to suggest that this particular case is not an ideal vehicle for addressing the issue because of the supposedly "unique facts" of this case. BIO at 2. Respondent is wrong. The decision below cleanly and clearly presents the question whether a state may permissibly impose on employment arbitration agreements a condition that the employee sign or otherwise give explicit, unmistakable assent to the agreement, when no such condition is imposed under "ordinary state-law principles that govern the formation of

---

[1] Respondent's suggestion that *certiorari* should be denied because "New Jersey courts have historically and repeatedly enforced arbitration agreements in accordance with the FAA," BIO at 7, is quite off base. In the only New Jersey Supreme Court case cited by respondent, the arbitration agreement had been signed by the party resisting enforcement and thus would have been enforced even under the special "unmistakable assent" rule adopted here. *See Martindale v. Sandvik, Inc.*, 800 A.2d 872, 875 (N.J. 2002). Thus, *Martindale* does nothing to undermine the basis for review of the decision below. Similarly, the plaintiffs had signed documents that included arbitration provisions in the two other cases cited by plaintiff. *Young v. Prudential Ins. Co. of America, Inc.*, 688 A.2d 1069, 1074 (N.J. Super. Ct. App. Div.), *cert. denied*, 694 A.2d 193 (N.J. 1997); *Singer v. Commodities Corp. (U.S.A.)*, 678 A.2d 1165, 1167 (N.J. Super. Ct. App. Div. 1996). In any event, this petition does not require this Court to determine the historical attitude of New Jersey courts towards employment arbitration agreements.

contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

That straightforward legal issue is presented on a factual record that is clean and undisputed for all purposes relevant to this Court's disposition of the case. The parties and the court below all agree that respondent received the two handbooks involved. Pet. App. 4a-6a. The parties and the court below all agree that each handbook states unambiguously that the agreement to arbitrate employment claims is a term and condition of continued employment. *Id.* Petitioners and the court below agree respondent knew of the arbitration policy. *Id.* at 18a. The parties and the court below all agree that respondent signed forms acknowledging that he had received each handbook and reviewed the policies discussed therein. *Id.* And the parties and the court below all agree that respondent did *not* sign an additional handbook receipt that included an express acknowledgment of and agreement to petitioners' arbitration policy. *Id.* at 7a.

It is thus undisputed that the arbitration agreement was "written," as the FAA requires, but not *signed*, as the decision below effectively requires. The simple legal question is whether such a signature (or equivalent explicit assent, if that is possible absent a signed document) requirement may be imposed uniquely on employment arbitration agreements consistent with the FAA. Or stated differently, may a state court require employers to obtain the unmistakable assent of employees to arbitrate when *contracting parties in other contexts are not required to make such special efforts in order to form enforceable contracts*?

Respondent nevertheless suggests that this case is "unique" because petitioners initially required employees to sign a receipt, which included the explicit acknowledgment of and agreement to the arbitration policy, and later rescinded this requirement. In addition to being incomplete and misleading, respondent's description of the events surrounding the two forms of receipt is irrelevant to the issue posed by this petition.[2] The unmistakable assent rule was not based upon the facts of this case, but a rule the New Jersey Supreme Court fashioned for all employment arbitration agreements. Pet. App. 20a. Only by applying its special unmistakable assent rule (despite the employee's knowledge of the policy and acceptance of continued employment, "no one document or other piece of evidence . . . unmistakably reflects plaintiff's agreement to that policy"), was the court able to declare the contract unenforceable. Thus, the opinion squarely raises the question whether such a special rule may be adopted and applied to deny enforcement of an arbitration agreement consistent with the FAA.

---

[2] Respondent's claim that petitioners had withdrawn its offer to arbitrate by submitting a second form of receipt without explicit reference to arbitration was rejected by the lower court and contradicted by the documents. Pet. App. 16a-17a. Respondent relies primarily upon the e-mail explaining the need for the second form of receipt but (by using an ellipse in his quotation) fails to acknowledge a critical statement in the e-mail: "We now believe that the recent high level of visibility and dialogue around the Handbook more than meets the test of ensuring that *everyone is aware of company policy* and eliminates the need for potential penalties," *Id.* at 8a-9a (emphasis added). Thus, reference to arbitration in the receipt (signed by respondent) was unnecessary to ensure that employees were aware of the arbitration policy. *See also* Pet. 6-7.

Certainly neither the opinion nor respondent cites a single New Jersey precedent involving "ordinary state-law principles that govern the formation of contracts," *First Options*, 514 U.S. at 944, that holds an ordinary, non-arbitration agreement to be unenforceable under similar circumstances. In fact, as the petition demonstrates, New Jersey courts routinely hold employers and employees bound to other employment policies, even absent a signature, when the employee accepts an offer of (continued) employment with full knowledge of the policy. Pet. 16-18. Respondent does not disagree. Nor can respondent plausibly deny that the court in this instance failed to follow that usual rule, and instead adopted and applied a special signature/unmistakable assent rule to bar enforcement of petitioners' arbitration policy. Because the decision below unquestionably treats an employer's arbitration policy as materially different from other employment policies (and other types of contracts) under state law, it directly conflicts with the FAA's "same footing" mandate and numerous decisions of this Court enforcing that mandate.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted.

Respectfully submitted,

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, NW
Suite 500 West
Washington, DC 20004
(202) 383-5300

ROBERT C. DRAKE
CIGNA CORPORATION
Two Liberty Place
1601 Chestnut Street
Philadelphia, PA 19192
(215) 761-1000

JAMES B. HERMAN
ACE USA
Two Liberty Place
1601 Chestnut Street TL35M
Philadelphia, PA 19103
(215) 640-1000

EDWARD T. ELLIS
Counsel of Record
JANICE G. DUBLER
MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP
Liberty View
457 Haddonfield Road
Suite 600
Cherry Hill, NJ 08002
(856) 488-7700

MICHAEL K. FUREY
BRETT M. REINA
RIKER, DANZIG, SCHERER, HYLAND & PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962
(973) 538-0800

Counsel for Petitioners